

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT CORWIN, D.D.S. derivatively on
behalf of JDS UNIPHASE CORPORATION,

Plaintiff,

v.

MARTIN A. KAPLAN, et al.,

Defendants,

and

JDS UNIPHASE CORPORATION,

Nominal Defendant.

No. C 02-2020 CW
ORDER GRANTING
DEFENDANTS'
MOTION TO DISMISS
THE SECOND
AMENDED COMPLAINT

_____ /

Defendants Jozef Straus, Don Scifres, Martin A. Kaplan, Bruce
D. Day, Robert E. Enos, Peter A Guglielmi, John A. MacNaughton,
Wilson Sibbett, Anthony R. Muller, M. Zita Cobb, Joseph Ip, Charles
J. Abbe, Frederick L. Leonberger, Michael C. Phillips, and Harry
Deffebach (collectively individual Defendants) as well as nominal

1 Defendant JDS Uniphase Corporation (JDSU) move to dismiss the
2 second amended complaint (SAC) in this shareholder derivative
3 action. Derivative Plaintiffs Robert Corwin and Michal Shalom
4 oppose the motion. The motion was heard on September 4, 2008.
5 Having considered all of the papers filed by the parties and
6 argument on the motion, the Court GRANTS Defendants' motion to
7 dismiss.

8 BACKGROUND

9 On April 24, 2002, the original complaint was filed in this
10 case.¹ The original complaint stated claims against six of the
11 fifteen current individual Defendants. On August 1, 2002, the
12 Court entered an order to show cause why this case should not be
13 dismissed for lack of subject matter jurisdiction. On September 2,
14 2002, Plaintiff filed a First Amended Complaint (FAC) in response
15 to the OSC.² On November 3, 2003, the Court granted Defendants'
16 motion to dismiss the FAC, finding that Plaintiff failed adequately
17 to allege demand futility, that is, that it was excused from making
18 a demand to the board of directors that JDSU proceed with these
19 claims before filing this suit. In addition, the Court dismissed
20 each of the causes of action for failure to state a claim.
21 Specifically, the Court found that the breach of fiduciary duty

22 ¹Corwin was the only Plaintiff named in the original complaint
23 and the First Amended Complaint in this case. Shalom was included
24 in the SAC after the Court consolidated his case, Shalom v. Kaplan,
C 02-2989, with this case.

25 ²This amended complaint is titled "Verified First Amended
26 Consolidated Shareholder Derivative Complaint." As noted below,
27 Plaintiff later filed another complaint with the same title. The
28 Court will refer to this complaint as the first amended complaint
(FAC) and the later complaint as the further amended complaint.

1 claim based on insider trading failed as a matter of law because
2 Plaintiff failed to plead with particularity facts sufficient to
3 support a finding of insider trading. In addition, the Court ruled
4 that Plaintiff's claims for breach of fiduciary duties, waste of
5 corporate assets and indemnification were deficient because they
6 depended upon a finding of liability in the then-pending securities
7 fraud action against JDSU and several of the individual Defendants,
8 In re JDS Uniphase Securities Litigation, C 02-1486 (In re JDSU),
9 to establish causation and damages.³ At that time, Defendants
10 requested a stay of this case, pending the resolution of In re
11 JDSU. The Court denied the motion to stay.

12 On January 16, 2004, Plaintiff filed a further amended
13 complaint.⁴ On March 17, 2004, Defendants moved to dismiss the
14 further amended complaint, again arguing that Plaintiff failed to
15 plead facts sufficient to support a finding of demand futility or
16 to state a claim upon which relief could be granted. On January 6,
17 2005, the Court stayed this case pending resolution of In re JDSU.
18 In its order staying the case, the Court noted,

19 The material facts in this action are the same as
20 those in In re JDS. Because the Court has denied the
21 defendants' motion to dismiss in that case, it would
22 not be in the interest of justice for the Court to
23 grant Defendants' motion to dismiss here, even though
24 Plaintiff's current complaint is still not adequately
25 plead.

26 ³The Court also dismissed with prejudice a cause of action for
27 "abuse of control."

28 ⁴As noted above, this amended complaint is also titled
"Verified First Amended Consolidated Shareholder Derivative
Complaint." The Court will refer to this complaint as the further
amended complaint.

1 Docket No. 59 at 2. In a separate order, the Court denied
2 Defendants' motion to dismiss, without prejudice to refileing the
3 motion.

4 In orders dated August 24, September 27 and October 10, 2007,
5 the Court granted partial summary judgment in favor of the In re
6 JDSU defendants. The remaining claims were tried to a jury in
7 October and November, 2007. On November 27, 2007, the jury
8 returned a verdict in favor of the In re JDSU defendants on all
9 claims.

10 On April 22, 2008, the parties submitted in this case a
11 stipulation allowing Plaintiffs to file the SAC. The stipulation
12 provides, "Upon the filing of a Second Amended Complaint, the First
13 Amended Complaint⁵ shall be deemed dismissed without prejudice."
14 Docket No. 81. On May 8, 2008, Plaintiffs filed the SAC, alleging
15 claims for: (1) breach of fiduciary duty, insider selling and
16 misappropriation of information based on allegations of insider
17 trading; (2) breach of fiduciary duty based on Defendants' actions
18 exposing JDSU "to a significant risk of liability and damages, and
19 loss of corporate goodwill," SAC ¶ 86; (3) indemnification; and
20 (4) waste of corporate assets. On June 20, 2008, Defendants filed
21 the present motion to dismiss.

22 DISCUSSION

23 I. Demand Futility

24 Defendants argue that the SAC again fails to allege facts
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26 ⁵It appears that the parties are referring to the further
27 amended complaint, which was the operative complaint at the time of
28 the stipulation.

1 sufficient to support a finding that a demand that JDSU pursue the
2 claims in this complaint would have been futile. As discussed in
3 the Court's earlier order, under the substantive law of Delaware,⁶
4 "the right of a stockholder to prosecute a derivative suit is
5 limited to situations where the stockholder has demanded that the
6 directors pursue the corporate claim and they have wrongfully
7 refused to do so or where demand is excused because the directors
8 are incapable of making an impartial decision regarding such
9 litigation." Rales v. Blasband, 634 A.2d 927, 932 (Del. 1993); see
10 also In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 989
11 (9th Cir. 1999) ("A shareholder seeking to vindicate the interests
12 of a corporation through a derivative suit must first demand action
13 from the corporation's directors or plead with particularity the
14 reasons why such demand would have been futile."). A demand is
15 futile if "the particularized factual allegations of a derivative
16 stockholder complaint create a reasonable doubt that, as of the
17 time the complaint is filed, the board of directors could have
18 properly exercised its independent and disinterested business
19 judgment in responding to the demand." Id. at 934. Under federal
20 procedural law, the facts necessary to demonstrate that demand
21 would be futile must be plead with particularity. Fed. R. Civ. P.
22 23.1; In re Silicon Graphics, 183 F.3d at 989.

23 Defendants first argue that the SAC fails because all
24 allegations regarding demand futility concern the board of
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26 ⁶The substantive law of Delaware applies because JDSU is a
27 Delaware corporation. In re Silicon Graphics, 183 F.3d 970, 990
28 (9th Cir. 1991).

1 directors in place at the time this lawsuit was originally filed.
2 Citing Braddock v. Zimmerman, 906 A.2d 776 (Del. 2006) (en banc),
3 Defendants argue that Plaintiffs must demonstrate demand futility
4 with respect to the board of directors in place when the SAC was
5 filed. In Braddock, the Delaware Supreme Court held that, under
6 Delaware procedural law, "a dismissal without prejudice and without
7 explicit leave to amend operates as a final judgment." Id. at 779.
8 Therefore, the Delaware court held that "when a complaint is
9 amended after a new board of directors is in place," a plaintiff
10 must demand that the new board pursue the claims unless, "first,
11 the original complaint was well pleaded as a derivative action;
12 second, the original complaint satisfied the legal test for demand
13 excusal; and third, the act or transaction complained of in the
14 amendment is essentially the same as the act or transaction
15 challenged in the original complaint." Id. at 786.

16 Because the Court dismissed the first amended complaint and
17 found that the further amended complaint was "not adequately
18 plead," Defendants argue that the first Braddock element is not
19 satisfied and Plaintiffs must establish demand futility with
20 respect to the JDSU board of directors, as it existed in 2008. The
21 Court need not decide whether Braddock applies to this case
22 because, even accepting Plaintiffs' argument that they need to
23 demonstrate demand futility based on the original filing of this
24 suit, their allegations regarding demand futility in 2002 are
25 deficient. As in their original complaint, Plaintiffs allege that
26 demand is excused because Defendants, who comprise a majority of
27 the board, as it existed in 2002, engaged in illegal insider
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1 trading, thereby benefitted from the wrongful conduct alleged in
2 the complaint and are likely to face liability if this case moves
3 forward.

4 However, Plaintiffs have not plead facts sufficient to support
5 a finding that the six members of the 2002 board named as
6 Defendants are likely to face liability.⁷ Indeed, the Court
7 earlier dismissed Plaintiffs' cause of action based on insider
8 trading in the FAC, finding that "the FAC does not contain facts
9 sufficient to establish that Defendants were in the possession of
10 material non-public information at the time that they traded in
11 JSDU stock." Docket No. 39 at 5.

12 The FAC alleged,

13 The Individual Defendants, through their positions
14 as chairs of the Audit Committee and Compensation
15 Committee, directors, and/or senior officers of the
16 Company and their receipt of reports, attendance at
17 meetings, and access to all of the Company's books,
18 records and other proprietary information, had
19 responsibility for and, therefore, were in possession
20 of, material non-public information concerning the
21 Company and its inventory, orders for product
22 operations, finances and business prospects. This
23 material non-public information included, but was not
24 limited to, the Company's sales and growth prospects
25 and the effect that the sharp downturn in the
26 telecommunications industry had on those growth
27 prospects.

21 FAC ¶ 12.

22 The SAC contains various additional allegations about the
23 material non-public information Plaintiffs contend Defendants
24 possessed when they traded in JSDU stock. However, the SAC also
25 alleges that such information was the subject of emails and

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27 ⁷The six Defendants who were board members in 2002 are Kaplan,
28 Straus, Enos, Guglielmi, Day and Scifres.

1 meetings which were not received or attended by any of the six
2 board-member Defendants other than Straus. Plaintiffs' new
3 allegations about how the remaining Defendants could have received
4 such information are similar to the allegations in the FAC and are
5 similarly deficient. Plaintiffs allege,

6 At the time of their insider stock sales, the Director
7 Defendants all seasoned senior executives in the
8 telecommunications and data transmission industries,
9 with access to the Company's computer systems and at
10 least quarterly JDSU internal reports indicating a
11 slowdown in demand for JDSU's products from its
12 customers, knew that the Company's business prospects
13 were changing and that when this information became
14 public, the market price of JDSU's shares would likely
15 decline sharply.

16 SAC ¶ 81.

17 Moreover, as Defendants point out, of the six board-member
18 Defendants, only two were members of JDSU's management and the
19 remaining four were outside directors. Plaintiffs do not allege
20 that these four outside directors were involved in the day-to-day
21 operations of JDSU or that they received specific information about
22 the company's demand projections.

23 The Court finds that Plaintiffs have again failed to plead
24 with particularity facts sufficient to establish demand futility.
25 Therefore, the Court dismisses Plaintiffs' complaint with
26 prejudice.

27 II. Failure to State a Claim

28 Defendants also renew their argument that Plaintiffs'
complaint fails to state a claim pursuant to the requirements of
Delaware law. See First Nat'l City Bank v. Banco Para El Comercio
Exterior De Cuba, 462 U.S. 611, 621 (1983) ("As a general matter,

1 the law of the state of incorporation normally determines issues
2 relating to the internal affairs of a corporation."). Although
3 Defendants contend that all of Plaintiffs' causes of action fail to
4 state a claim, their argument regarding causation and damages
5 relates only to Plaintiffs' second, third and fourth causes of
6 action for breach of fiduciary duty, indemnification and waste of
7 corporate assets. These causes of action are based on allegations
8 of insider trading and the communication of misleading information
9 about the strength of the market for JDSU's products. As
10 Plaintiffs point out, liability for insider trading does not
11 require damage to the corporation under Delaware law. See Thomas
12 v. Roblin Indus., Inc., 520 F.2d 1393, 1397 (3rd Cir. 1975)
13 (liability exists for insider trading claims "for any gains without
14 regard to whether the corporation suffered damages as a result of
15 the corporation."). Therefore, Defendants' arguments do not relate
16 to Plaintiffs' first cause of action.

17 In their motion to dismiss the FAC, Defendants argued that the
18 damages claimed for what are now Plaintiffs' second, third and
19 fourth causes of action were speculative because they were based
20 only on the potential for damages if JDSU were found liable in In
21 re JDSU. The Court found that these causes of action were
22 "deficient, and must be dismissed" because the "the only wrongful
23 conduct alleged in the FAC is that Defendants engaged in illegal
24 insider trading and issued misleading statements regarding JDSU's
25 financial health" and the "FAC does not allege that these wrongful
26 acts caused the damages to JDSU that Plaintiff now asserts, nor is
27 it apparent how these wrongful acts could have caused such
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1 damages." Id. at 6. Defendants argue that the damages claimed in
2 the SAC mirror the speculative damages claimed in the FAC.
3 Moreover, Defendants point out, Plaintiffs can no longer speculate
4 that such damages will be proved because judgment was entered in
5 JDSU's favor in In re JDSU. Plaintiffs allege that, as a result of
6 Defendants' conduct, "JDSU has been exposed to a significant risk
7 of liability and damages, and loss of corporate goodwill." SAC ¶
8 86. Similarly, Plaintiffs broadly allege that Defendants' insider
9 trading was "to their great benefit, and to the detriment of the
10 nominal defendant," and Defendants' conduct "caused JDSU to waste
11 valuable assets." Id. at ¶¶ 89, 92. Plaintiffs have not cured the
12 deficiency identified in the FAC by alleging how Defendants'
13 conduct caused the purported damages. Further, it is not clear
14 what damages Plaintiffs believe JDSU has suffered. Therefore,
15 Plaintiffs' second, third and fourth causes of action are dismissed
16 with prejudice for this reason as well.⁸

CONCLUSION

18 For the foregoing reasons, the Court GRANTS Defendants' motion
19 to dismiss (Docket No. 93). Plaintiffs' SAC is dismissed with
20 prejudice and judgment shall enter accordingly. The Clerk shall
21 close the file.

IT IS SO ORDERED.

Dated: 9/16/08



CLAUDIA WILKEN
United States District Judge

26 ⁸Because the Court dismisses Plaintiffs' claims based on their
27 failure to allege demand futility and their failure to state a
28 claim, it need not reach Defendants' argument that Plaintiffs'
claims are barred by collateral estoppel.

United States District Court
For the Northern District of California

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